26

Office - Supreme Court, U. S.
FILED
JUL - 3 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, ~~1951~~ 1952

No. 189

MARY ELLA HARRIS,
Petitioner,

vs.

SADIE BEATRICE HARRIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

ORILLE C. GAUDETTE,
STANLEY E. OTTO,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Jurisdictional Statement	1
Summary and Statement of the Matter Involved	2
Points Raised on Appeal	5
Questions Presented	5
Reasons for the Allowance of Writ	5
Argument	6
Conclusion	13

Cases Cited on Appeal

Daniels & Fisher Realty Co. vs. Kenyon, 261 Fed. 407	7
Esenwine vs. Commonwealth, 325 U. S. 279	11
Evans vs. Evans, 80 U. S. App. D. C. 133, 149 Fed. 2d 831	10
Galliher vs. Cadwell, 145 U. S. 368	8
Gullet vs. Gullet, 80 U. S. App. D. C. 73, 149 Fed. 2d 17	9, 10
Gullet vs. Gullet, 85 U. S. App. D. C. 13, 174 Fed. 2d 531	9, 11
In re Hendrickson's Estate, 203 N. W. 778	7
Loughran vs. Loughran, 298 U. S. 216	7
Owen vs. Schwartz, 85 U. S. App. D. C. 302, 177 Fed. 2d 641	9
Rice vs. Rice, 335 U. S. 842, Supreme Court Case No. 117, October Term, 1948	12
Sears vs. Sears, 67 U. S. App. D. C. 379, 92 Fed. 2d 530	10
Williams vs. North Carolina, 317 U. S. 287	11
Williams vs. North Carolina, 325 U. S. 226	11

Statutes Cited on Appeal

28 U. S. Code, Sec. 1254	1
Title 30, Section 101, D. C. Code (1940 Ed.)	11, 13

Rules of Court Cited on Appeal

F. R. C. P. Rule 16	8

Supreme Court of the United States

OCTOBER TERM, ~~1951~~ 1952

No.

MARY ELLA HARRIS,

Petitioner,

vs.

SADIE BEATRICE HARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Mary Ella Harris, prays for a Writ of Certiorari to review the judgment below dismissing her appeal.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1254.

The judgment below was entered February 28, 1952.

A petition for rehearing on the judgment below was denied April 10, 1952.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

The will of Joshua Harris, deceased, was filed October 11, 1948, the pertinent part thereof reciting—"Second, I give, devise and bequeath to my beloved sister, Lillie Harris, now residing at 1833 Providence Street, N.E., Washington, D. C., all of my real, personal and mixed property which I now have or may in the future acquire, and wherever situate, to have and to hold the same absolutely and in fee simple, subject only to the Dower right of my wife, Sadie Beatrice Harris" (J. A. 2).

On January 12, 1949, a Petition for Probate of Will and for Letters Testamentary was filed by Lillie Harris, executrix, in which it was set forth that Petitioner and Respondent each made claim of dower in the estate of Joshua Harris, deceased, by reason of a legal marriage between the parties; Petitioner and decedent being married November 17, 1917, and Respondent claiming the marriage as not being legally dissolved during the life-time of the decedent, although the Petitioner reported that among the decedent's effects there was found a purported "Final Decree of Divorce" between Joshua Harris, deceased, and Petitioner. Respondent and decedent being married June 14, 1936 (J. A. 21).

On January 30, 1950, after the death of the Executrix, a Petition for Letters of Administration, d.b.n., c.t.a., was filed, the petitioner reciting precisely, and in substance the same facts as to the claims of the Petitioner and Respondent (J. A. 3) as appearing in the prior pleading. The Administrator, d.b.n., c.t.a., being originally and continuously the Attorney of record for the estate.

During all of the intervening time, and after, a diligent search, inquiry and investigation of the respective claims of the Petitioner and Respondent was made. The Administrator d.b.n., c.t.a. on August 18, 1950 filed a Petition for Instructions setting forth the results of the investigations (J. A. 5). Succinctly (J. A. (Para. 4A) 5), Petitioner married Joshua Harris deceased, November 22, 1917, at

Alexandria, Virginia; a final decree of divorce was granted in the case of Joshua Harris vs. Mary E. Harris, in the Circuit Court of Fairfax County, Virginia, dated December 5, 1936, but that Petitioner denied all knowledge of same, including service, until after the death of decedent, November, 1948, and that to Petitioner's knowledge, Joshua Harris, deceased, was never a resident of nor domiciled in the State of Virginia (J. A. (Par. 4B) 6). Respondent married Joshua Harris, deceased, June 14, 1936, at Washington, D. C., Respondent using the name of Sadie Beatrice Redmond (J. A. 21 (Exhibit 4)), that also of record (J. A. 21 (Exhibit 5)) Respondent married Owen D. Redmond August 15, 1913 at Washington, D. C., and that no record was found indicating a divorce between Respondent and Owen D. Redmond; that also of record (J. A. 22 (Exhibit 6)) Owen D. Redmond had lived until December 15, 1941. (J. A. 6 (Para. B)) The Court's attention was called to facts as shown by the investigation that Joshua Harris, deceased, had been a resident of and domiciled in the District of Columbia from about 1922 until his death, 1948, living at 1833 Providence Street, N.E., Washington, D. C.; that in the records of his employment (J. A. 18-19 (Exhibits 1 and 2)) his given address as of December 20, 1934 and January 21, 1935 was 1833 Providence Street, N.W., Washington, D. C., the dates given being less than one year before the date given in the "Final Decree" of divorce, December 5, 1935, one year being a jurisdictional time of residence and domicile required in the State of Virginia; further, that Mrs. Marion J. Bailey, nee Marion J. Brown, was generally known as the adopted daughter of the deceased, and lived at 1833 Providence St., N.E., Washington, D. C., during the years of 1923 to 1948, with decedent at said address, and that during all those years decedent was not away from place of abode more than 24 hours at any one time, and the decedent was never known to be a resident of or domiciled in the State of Virginia (J. A. 7 (Para. 5)). The Administrator, d.b.n., c.t.a., by reason of the result of the investigation asked the

Court to determine the relative rights to dower of the Petitioner and Respondent and caused citations to be issued to Petitioner and Respondent, respondents below (J. A. 8 (Prayer 1)) and a trial be had on the issues.

On September 1, 1950, Petitioner, respondent below, filed an answer to the Petition for Instructions (J. A. 8) which in substance corroborated the investigation and report of the Administrator, d.b.n., c.t.a.

On November 9, 1950, Respondent, respondent below, filed an answer to Petition for Instructions, which also, in substance corroborated the investigation and report of the Administrator, d.b.n., c.t.a. (J. A. 10).

On February 29, 1951, an Order Framing Issues was filed (J. A. 14).

On March 19, 1951, there was a pre-trial of the issues involved and Pre-Trial Proceedings filed (J. A. 15).

On April 18 and 19, 1951, trial was had in the lower Court. The Petitioner and six of Petitioner's witnesses testified. Petitioner substantiating her claim to dower right as contained in her Answer to Petition for Instructions (J. A. 8), the remainder of the witnesses unremittingly established that Joshua Harris, deceased, had been and was a resident of and domiciled in the District of Columbia from the years of 1922 to the date of his death in 1948 without interruption, and exhibits one to six (J. A. 18-22), inclusive, were introduced into evidence. Exhibt No. 5 adduced that Respondent was married to Owen Redmond (J. A. 21) at the time of her marriage to Joshua Harris, deceased (J. A. 21). Upon conclusion of the case for Petitioner, the Court orally announced its findings (J. A. 65), subsequently, on May 7, 1951, an Order Instructing Administrator, d.b.n., c.t.a., was filed (J. A. 17).

POINTS RAISED ON APPEAL.

The Court below erred as follows:

1. In holding that the Petitioner was precluded from collaterally attacking a foreign judgment of divorce on the ground of lack of jurisdiction.

2. In holding that Petitioner lost the right to dower because of no action having been taken to set aside the foreign decree of divorce until the right to dower accrued.

3. In refusing to adhere to issues formulated at a pretrial hearing and an order reciting such action.

4. In entering the order of May 7, 1951 compelling the Administrator, d.b.n., c.t.a. to recognize, as legal, the marriage of Respondent and Joshua Harris, deceased, dated April 14, 1936, and thereby recognize as legal the right of dower in the Respondent in contradiction of the District of Columbia Code of Laws.

5. In entering the order of May 7, 1951, contrary to and inconsistent with and unsupported by the evidence, record and the law of the case.

6. And for other errors which may be apparent from the record, or come to the attention of the Appellate Court.

QUESTION PRESENTED.

Whether laches estops a claim to dower, upon accrual, through a collateral attack on a decree of divorce rendered by a foreign state having no jurisdiction.

REASONS FOR THE ALLOWANCE OF THE WRIT.

The Petition asserts that a Writ of Certiorari should be granted in this cause under subdivision 5 of Rule 38 of this Honorable Court because:

(a) The United States Court of Appeals for the District of Columbia Circuit has decided a question in a way probably not in accord with applicable decisions of this Court.

(b) The United States Court of Appeals for the District of Columbia Circuit has decided an important question of local law in a way probably in conflict with applicable local decision and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance and a question of substance relating to the construction or application of the Constitution, which has not been, but should be, settled by this Court.

(d) The United States Court of Appeals for the District of Columbia Circuit in holding that laches estops a claim to dower, upon accrual, through a collateral attack on a decree of divorce rendered by a foreign state having no jurisdiction, in the instant case has presented, de novo, a proposition of substantive law striking the very core of marriage, its rights, duties and obligations as well as its sanctity and opens the questions as to when and how a marriage is to begin and terminate and the question should be settled by this Court.

ARGUMENT.

I.

Dower is an Inchoate Right and Not Subject to the Caprice of a Testator. The Court Erred in Considering the Naming of a Person in a Will as a Basis for a Dower Right.

The testator by his will devised and bequeathed to his sister, Lillie Harris, all of his estate, "subject only to a Dower right of my wife," and adding the name, "Sadie Beatrice Harris." The lucidness of the bequest is undeniable, the testator's admonishment was to vest his entire estate in his sister, subject only to a dower right. (J. A. 2)

The entity of dower is best defined by the requisites of dower, *Loughran* v. *Loughran*, 298 U. S. 216, "Three things are necessary to the consummation of the widow's right to dower: A valid marriage; seizen of the husband and his death."

Dower is a technical word, and, *Daniels & Fisher Realty Co.* v. *Kenyon*, 261 Fed. 407, "Where a testator uses in his will technical words or terms, or words having a definite legal signification, he will be presumed to have used them in that sense, and the will will be so construed unless a clear intention to the contrary is apparent from the context."

The naming of a legatee entitled to dower in a will is of little consequence, *In re Hendrickson's Estate*, 203 N.W. 778, "Where the will is clear that the testator bequeaths property to a legatee for a particular purpose, and it is disclosed that such legatee is misnamed, it ought not to make any substantial difference whether the name used is of no other party or a party not intended, the right legatee ought to be ascertained."

II.

The Petitioner's Claim to Dower was Timely and Diligently Pursued. The Court Erred in Applying the Doctrine of Laches.

The Petitioner's right to dower did not accrue until the death of her husband. The implication of the Court is that Petitioner should have acted before the death of her husband. *Loughran* v. *Loughran*, 258 U. S. 216, "The estate" (dower) "in all its grades demands for its existence the marriage and seizen, but it does not become consummate until after the husband's death."

The Petitioner, upon the accrual of a right to dower, immediately took affirmative action consistent with her right and duty and has diligently pursued her claim to the pres-

ent time. The record is clear without equivocation as to this fact. *Galliher* v. *Cadwell*, 145 U. S. 368, "To charge a party with laches in delaying to assert a right, an opportunity must have existed."

The only other inference to be adduced as to the application of the doctrine of laches, which was not a pre-trial issue (J. A. 14-15), by the Court is that the Court imposed a requirement upon the Petitioner of a legal duty and obligation to affirmatively act prior to the death of her husband. The Petitioner legally married the decedent and in no way breached or violated her contract of marriage with the decedent during his life time. The record and evidence substantiate the fact. Assuming the Petitioner knew of the divorce action, knew that decedent and Respondent had married, there still was no legal duty or obligation upon the part of the Petitioner to affirmatively act if such divorce was illegally procured and the marriage of the Respondent and decedent was illegally consummated. The right to dower accrued at the time of the death of the decedent and not before, and a valid marriage is the essence of vested right to dower.

III.

Pre-Trial Issues Formulated Govern and Control the Subsequent Course of Action. The Court Erred in Failing to Follow the Same.

It is submitted that in reaching its decision, the lower Court failed to give due consideration created by Rule 16, F.R.C.P., but rather refused and ignored the order of the Pre-Trial Court concerning the issues formulated.

Petitioner, through her attorney of record, at a pre-trial hearing, actually presented but one issue, viz., denying the legality of the foreign decree of divorce for lack of jurisdiction of the foreign state to grant the same. This issue was formulated and an order reciting same was entered by the Pre-Trial Court (J. A. 14). Consistently, this

Court has ruled, *Owen* v. *Schwartz*, 85 U. S. App. D. C. 302, 177 Fed. 2nd 641, "The purpose of Rule 16, Federal Rules of Civil Procedure, is to formulate the issues for trial, and when the issues are formulated at a pre-trial hearing, the court is required to enter an order reciting such action. When entered, such pre-trial order controls the subsequent course of the action." An anomaly occurred, the lower Court permitted the Petitioner to present, at trial, her entire case, and then refused to consider the issue involved.

Attention is called to the two cases of *Gullet* v. *Gullet*, 80 U. S. App. D. C. 73, 149 Fed. 2nd 17, and *Gullet* v. *Gullet*, 85 U. S. App. D. C. 13, 174 Fed. 2nd 531, where the facts and issues were strikingly similar to the instant case. The lower court refused to consider and ignored the pre-trial issues and orders in the first case, namely the contentions of the parties as to the validity of a foreign decree of divorce, lack of jurisdiction being questioned on the grounds of nonresidence. The lower court said, "The Court is of the opinion it is not necessary for the Court to pass upon this question as to whether or not he acquired a domicile in Florida, or whether or not there is any constitutional question involved." On appeal, this Court ruled, "The Supreme Court and this court have declared the law to the contrary," and "Reversed." In the second case, the lower court followed the pre-trial issue ordered, and ruled in favor of the plaintiff. Upon appeal to this court, the judgment was "Affirmed."

It is intimated in the ruling of the Court that the Administrator d.b.n., c.t.a., was asking the Court to collaterally attack the foreign decree of divorce. The Administrator, d.b.n., c.t.a., as the record shows, petitioned the Court to resolve the relative claims of dower made by the Petitioner and Respondent (J. A. 7). The purpose is clear, as well as the purport of the petition filed.

IV.

The Legal Right of Petitioner to Collaterally Attack a Foreign Decree of Divorce for Lack of Jurisdiction is Axiomatic. The Court Erred in Refusing to Give the Proper Consideration to the Record and Evidence Pertaining to the Collateral Attack and Thereby Annulling Petitioner's Claim to Dower.

The Petitioner interposed as a defense to a claim of dower a collateral attack upon the divorce decree granted the testator in the Circuit Court of Fairfax County, Virginia, for lack of jurisdiction (J. A. 3 and 8).

The testimony of the Petitioner and six of Petitioner's witnesses, as the record clearly shows, established that the testator was domiciled and a resident of the District of Columbia and was not known to be at any time a resident of the State of Virginia. Under facts quite similar in detail and substance, as appearing in the case of *Sears* v. *Sears*, 67 App. D. C. 379, 92 Fed. 2nd 530, this court ruled: "A decree of city corporation court of city in Virginia, granting divorce to wife who was not actual resident of such state for one year before filing bill, as required by law thereof, nor actual resident of city at time of filing bill, but actual resident of and domiciled in District of Columbia, was invalid in such district, so as to render her subsequent marriage therein void and to bar recovery by her suit against second husband for limited divorce and alimony."

In *Evans* v. *Evans*, 80 U. S. App. D. C. 133, 149 Fed. 2nd 831, "A divorce decree rendered by a Nevada court upon substituted service may be challenged in the District of Columbia on ground that moving party in the Nevada proceedings was not a bona fide domicilliary in that jurisdiction, notwithstanding the full faith and credit clause of the Federal Constitution. U. S. C. A. Const. Art. 4, 31."

In the first case of *Gullet* v. *Gullet*, 80 U. S. App. D. C. 73 149 Fed. 2nd 17, "* * * My ruling is that the marriage in Florida does not have any effect whatever upon 'this main

tenance case." "The Supreme Court and this Court have declared the law to the contrary." And in the second case of *Gullet* v. *Gullet*, 85 App. D. C. 13, 174 Fed. 2nd 531, "The proof presented was practically identical with that which was in record on the former appeal. * * * the District court found the Florida divorce decree was obtained by appellant's fraudulent representations to that court of a bona fide resident in Florida, a false representation of a jurisdictional fact." This ruling of the lower court was "Affirmed" on appeal.

In accordance with the District of Columbia Code of Laws (1940 Ed.), Title 30, Section 101, "* * * The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely * * * Third: The marriage of any persons either of whom has been previously married, and whose previous marriage has not been terminated by death or a decree of divorce."

The purpose, intention and meaning of the statute is quite obvious, viz., the act of going through a ceremonial marriage does not create the marriage relation if one or both of the parties have an impediment, such as an existing marriage. In such instance, such a marriage would be "absolutely void ab initio, without being so decreed and their nullity may be shown in any collateral proceedings." The implication as to that portion reciting "the termination of a marriage by decree of divorce" can have but one meaning a legal divorce.

A divorce decree may be collaterally attacked where the court of a foreign state had no jurisdiction to render the judgment. Jurisdiction is dependent upon the domicile of the plaintiff in the state for the length of time prescribed by statute and upon the observance of the requirements as to procedural due process. *Williams* v. *North Carolina*, 317 U. S. 287, followed by *Williams* v. *North Carolina*, 325 U. S. 226, *Esenwine* v. *Commonwealth*, 325 U. S. 279.

A more recent case which is analogous to the instant case is that of *Rice* v. *Rice*, 335 U. S. 842, Supreme Court case No. 117—October Term 1948. In this case Mr. and Mrs. Rice lived together in Connecticut for about twenty years. Mr. Rice then left Mrs. Rice and went to Reno, Nevada, and shortly thereafter filed a complaint of divorce against his wife. The complaint and process were handed to Mrs. Rice at her home in Connecticut. She was not served with process in Nevada. There was a trial at which Mr. Rice testified he had rented a furnished room in Reno and that he intended to remain there "indefinitely." He was awarded a divorce from Mrs. Rice.

After the divorce, Mr. Rice remarried and retained the room in Reno, which was occupied by him and his second wife. Subsequently they moved to California, where six months later Mr. Rice died.

The first Mrs. Rice brought an action in Connecticut to have herself declared his widow insofar as Connecticut real estate was concerned. The court reviewed the evidence as to whether Rice established a good faith domicile in Nevada and held that he had not and was not entitled to maintain an action there for divorce.

On a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut, the second wife as Petitioner, filed suit in the Supreme Court of the United States, resulting, Per Curiam, in the affirmation of the Connecticut ruling.

V.

The Marriage Between Respondent and Decedent Herein at Washington, District of Columbia, June 14, 1936, Was Void. The Court Erred in Holding the Marriage Valid.

The record is unequivocally clear, the Respondent as of June 14, 1936 was legally married to Owen Redmond and the marriage had not been dissolved by a divorce or death. The Respondent's answer, under oath, to Petition for Instructions (J. A. 10) admits such marriage, admits no

knowledge of a dissolution by divorce, then avers consultation with and engagement of an attorney in the city of Washington, District of Columbia, December, 1935, for the purpose of obtaining a divorce from Owen Redmond, and avers payment of $150.00 to the attorney to procure the divorce, attaching a copy of the receipt from the attorney to the answer, which recites, "Received from Mrs. Sadie Redmond the sum of One Hundred and 50/100 on account professional services in obtaining divorce." But no record discloses any such divorce. The answer then avers that the attorney advised that no divorce was necessary because Owen Redmond had disappeared about December 31, 1917. It is interesting to note that the record discloses the same attorney, at about the same time, representing the decedent and Respondent. A mere coincidence, perhaps.

The District of Columbia Code of Laws (1940) Title 30, Sec. 101, unmistakably declares the marriage between the decedent and Respondent to be "absolutely void ab initio," and the court erred in holding to the contrary, thereby declaring Respondent surviving widow entitled to dower in decedent's estate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ORILLE C. GAUDETTE,
STANLEY E. OTTO.
Counsel for Petitioner.

Certificate of Service

I hereby certify that a copy of the foregoing petition was served upon Harry L. Ryan, Jr., counsel for Respondent by mailing a copy of same postage prepaid to his office address, 815 15th Street, N.W., Washington 5, D. C.

ORRICK, STANLEY C. GARDNER,
Counsel for Petitioner.

27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 189.

MARY ELLA HARRIS, *Petitioner*,

v.

SADIE BEATRICE HARRIS, *Respondent*.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

ORILLE C. GAUDETTE,
STANLEY E. OTTO,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.